YY Property Solutions Sdn Bhd v Kuok Chiu Hoon Selina & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–518 OF 2011
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND BALIA YUSOF JJCA
20 SEPTEMBER 2013

Contract — Offer and acceptance — Offer and counter-offer — Whether terms and conditions proposed in offer replaced and superseded by acceptance of counter-offer — Whether silence of parties concerning any term in original offer did not revive that term and make it part of agreement between parties

The respondents were registered owners of a piece of land and had engaged the services of the appellant, a real estate agency, to be their agent to secure a buyer for the land. In a letter to the respondents ('ET1'), the appellant proposed an interested purchaser and, apart from other terms and conditions, that if the deposit paid by the intended buyer was forfeited, the appellant be entitled to half of its professional fees as abortive fees. The respondents did not signify their acceptance of ET1. Instead, pursuant to a meeting between the parties, the respondents made a counter-offer of revised terms and conditions to the appellant by letter ('ET2'). No mention was made in ET2 about abortive fees. ET2 was made on the same day the respondents accepted and banked in the earnest deposit paid by the intended buyer. The sale of the land was aborted and the respondents forfeited the earnest deposit. The appellant sued the respondents in the High Court to recover half of the earnest deposit as its abortive fees by relying on ET1 and the guidelines in the Malaysian Real Estate Agency Standards which, inter alia, provided that if a deal was aborted the estate agent was entitled to claim half of his full professional fees or half of the forfeited deposit, whichever was the lower. The respondents successfully applied to strike out the appellant's action under O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980 resulting in the instant appeal.

Held, dismissing the appeal:

(1) ET1 was an offer made by the appellant on behalf of the intended purchaser. By neither signing nor executing the proforma invoice on ET1, the respondents could not be said to have agreed to the terms and conditions of ET1. They had also not acquiesced to the terms and conditions in ET1 by conduct as pursuant to a meeting between the parties, the respondents made a counter-offer in ET2 containing the revised terms and conditions which effectively replaced or superseded the terms and conditions in ET1 (see paras 28–29).

(2) The proposed term regarding abortive fees was not agreed to by the respondents and did not become a term of the agreement reached between the parties. Moreover, in its letters subsequent to ET1, the appellant while acknowledging the revised term on their professional fees made no mention about abortive fees (see para 32).

(3) The High Court did not commit any error by failing to give due consideration to the Malaysian Real Estate Agency Standards ('MREAS') because the appellant had not pleaded that it was placing reliance on the MREAS to prove that the imposition of abortive fees was a standard practice in the Malaysian real estate market and dealings. Even if the MREAS had been pleaded, the rules and regulations of the MREAS were merely guidelines for practice and were not binding upon the parties. Moreover, Standard 7 of the MREAS yielded its importance to the agreement reached between the parties which, in this case, were the terms and conditions stated in ET2 (see paras 35–37).

(4) The appellant's claim was plainly and obviously unsustainable (see para 38).

[Bahasa Malaysia summary

Responden pemilik sebidang tanah berdaftar dan telah menggunakan khidmat perayu, agensi hartanah, menjadi ejen mereka untuk mendapatkan pembeli bagi tanah itu. Dalam surat kepada responden ('ET1'), perayu mencadangkan kepada bakal pembeli dan, selain daripada terma-terma dan syarat-syarat lain, bahawa jika deposit yang dibayar oleh bakal pembeli telah dilucuthakkan, perayu berhak untuk separuh daripada fi profesional sebagai fi abortif. Responden tidak menyatakan penerimaan mereka terhadap ET1. Sebaliknya, menurut kepada pertemuan antara pihak-pihak, responden membuat tawaran balas daripada terma dan syarat yang telah disemak kepada perayu melalui surat ('ET2'). Tidak sebutan telah dibuat dalam ET2 mengenai fi abortif. ET2 telah dibuat pada hari yang sama responden menerima dan memasukkan deposit cengkeram yang dibayar oleh bakal pembeli. Penjualan tanah digugurkan dan responden melucuthakkan deposit cengkeram. Perayu menyaman responden di Mahkamah Tinggi untuk mendapatkan semula separuh daripada deposit cengkeram sebagai fi abortif dengan bergantung kepada ET1 dan garis panduan dalam Agensi Harta Tanah Standard Malaysia yang, antara lain, dengan syarat bahawa jika perjanjian telah digugurkan ejen estet berhak menuntut separuh daripada fi profesional penuh atau separuh daripada deposit dilucuthakkan, mengikut mana yang lebih rendah. Responden berjaya memohon untuk membatalkan tindakan perayu di bawah A 18 k 19(1)(b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 menyebabkan rayuan segera.

Diputuskan, menolak rayuan:

(1) ET1 adalah tawaran yang dibuat oleh perayu bagi bakal pembeli. Dengan

tidak menandatangani dan tidak melaksanakan invois proforma pada ET1, responden tidak dapat dikatakan telah bersetuju kepada terma-terma dan syarat-syarat ET1. Mereka juga belum dibebaskan kepada terma-terma dan syarat-syarat dalam ET1 dengan kelakuan menurut mesyuarat antara pihak-pihak, responden membuat tawaran balas dalam ET2 yang mengandungi terma dan syarat yang telah disemak yang secara efektif menggantikan atau membatalkan terma-terma dan syarat-syarat dalam ET1 (lihat perenggan 28–29).

(2) Tempoh yang dicadangkan mengenai fi abortif tidak dipersetujui oleh responden dan tidak menjadi tempoh perjanjian yang dicapai antara pihak-pihak. Tambahan pula, dalam surat selepas ET1, perayu sewaktu mengakui terma-terma yang disemak pada fi profesional mereka tidak menyebut tentang fi abortif (lihat perenggan 32).

(3) Mahkamah Tinggi tidak melakukan apa-apa kesilapan kerana gagal memberi pertimbangan yang sewajarnya kepada Agensi Harta Tanah Standard Malaysia ('AHTSM') kerana perayu tidak mempli bahawa ia telah meletakkan pergantungan kepada AHTSM untuk membuktikan bahawa pengenaan fi abortif adalah amalan standard dalam pasaran hartanah dan urusan Malaysia. Walaupun AHTSM telah membuat pli, kaedah-kaedah dan peraturan-peraturan AHTSM hanyalah garis panduan untuk amalan dan tidak mengikat pihak-pihak. Tambahan pula, Standard 7 AHTSM menyerahkan kepentingannya kepada persetujuan yang dicapai antara pihak-pihak yang, dalam kes ini, adalah terma-terma dan syarat-syarat yang dinyatakan dalam ET2 (lihat perenggan 35–37).

(4) Tuntutan perayu adalah jelas dan nyata tidak berasas (lihat perenggan 38).]

Notes

For cases on offer and counter-offer, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5724–5725.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Cepatwawasan Group Bhd & Anor v Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & 17 Ors [2008] 2 MLJ 915, HC (refd)

Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558; [1999] 2 CLJ 886, HC (refd)

Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd [1987] 1 MLJ 413 (refd)

Sivakumar a/l Varatharaju Naidu v Ganesan a/l Retanam [2010] 7 MLJ 355; [2010] 9 CLJ 825, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 18 r 19(1)(b), (d)
Valuers, Appraisers and Estate Agents Act 1981
Valuers, Appraisers and Estate Agents Act 1986

Appeal from: Civil Suit No S-22–401 of 2010 (High Court, Kuala Lumpur)

Veronica Dominic (Prasad Abraham & Associates) for the appellant.
Shirin Pathmanathan (M Pathmanathan & Co) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] On 19 January 2011, the Kuala Lumpur High Court allowed the respondents' (defendants') summons in chambers and struck out the appellant's (plaintiff's) writ of summons and statement of claim under O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980 ('RHC'). Dissatisfied with such decision, the appellant filed this appeal.

THE BACKGROUND

[2] The respondents are the registered proprietors of an undivided parcel of land held under Lot 201/ Geran 36590, Section 63, Town and District of Kuala Lumpur, Wilayah Persekutuan ('the property').

[3] The respondents were planning to sell the property and had engaged the services of the appellant, a real estate agency, to act as the respondents' agent and to secure a purchaser for the property.

[4] The appellant wrote to the respondents in a letter dated 29 May 2008 ('ET1') proposing that, inter alia, Desa Setia Sdn Bhd ('the intended purchaser') purchase the property at the price of RM104,554,000 ('the purchase price') and pay RM1,023,660 as earnest deposit ('the earnest deposit') upon the respondents' confirmation of acceptance, the appellant's real estate professional fees ('REP fees') be 1.25% of the purchase price plus 5% government service tax which are payable upon signing of the sale and purchase agreement, and if the transaction is aborted, there should be no fees payable but if there is forfeiture of deposit, the appellant is entitled to half of REP fees as abortive fees.

[5] Despite the appellant's request in ET1, the respondents did not sign the

confirmation proforma at the bottom of ET1. The respondents maintained that they did not execute ET1 as they did not accept the proposed terms and conditions in ET1.

[6] The respondents' representative for the proposed sale, PPB Hartabina Sdn Bhd ('PPB'), replied in a letter dated 5 June 2008 ('ET2') with the revised terms and conditions, which included that the commission payable to the appellant shall be 1.25% of the purchase price, which shall be paid upon receipt of the purchase price in full.

[7] On the same day, 5 June 2008, the respondents had accepted and banked in the earnest deposit given by the intended purchaser.

[8] The appellant wrote a letter to PPB dated 6 June 2008 ('ET3') to confirm in writing what was agreed upon during their meeting on 5 June 2008 that the appellant's REP fees of 1.25% of the purchase price shall include 5% government service tax. The appellant wrote again on 23 June 2008 ('ET4') confirming that the REP fees were 1.25% of the purchase price plus 5% government service tax, which were payable upon receipt of the purchase price in full.

[9] The solicitors of the intended purchaser, Messrs Isharidah, Ho, Chong & Menon, wrote a letter to the respondents dated 12 June 2008 ('ET7') stating that the intended purchaser was agreeable to the respondents' counter proposal in ET2 except for paras (e)(i) and (iii) regarding the payment terms for the purchase price, and in that respect, preferred to adopt a term from ET1 instead.

[10] However, in late 2008, the proposed sale of the property was aborted and as a result, the respondents forfeited the earnest deposit.

[11] The appellant claims against the respondents for a sum of RM551,830 as abortive fees due and payable to the appellant pursuant to the terms and conditions set out in ET1. The abortive fees are calculated as 50% of the earnest deposit forfeited by the respondents.

THE APPEAL

[12] The appellant contends that the High Court judge had erred in law and in fact by, inter alia, failing to appreciate and evaluate the evidence before him and coming to erroneous conclusions in striking out the appellant's writ of summons and statement of claim.

[13] The appellant submits that the abortive fees which the appellant is claiming are distinct and separate from the REP fees which the respondents are defending against.

[14] The appellant relies on the terms and conditions stated in ET1 which stipulated the appellant's entitlement for abortive fees in the event that the earnest deposit is forfeited by the respondents. Although the respondents did not sign ET1, the respondents have acquiesced to the terms and conditions under ET1 by conduct, are deemed to have accepted ET1 and are therefore bound by ET1. The respondents had accepted and banked in the earnest deposit, which was paid by the intended purchaser pursuant to ET1, and had subsequently forfeited the earnest deposit upon the transaction being aborted.

[15] Further, in the event that ET1 is not a valid and binding agreement, the appellant contends that the imposition of abortive fees is a standard practice in the Malaysian real estate market and dealings. The appellant places reliance on the Malaysian Estate Agency Standards, especially Standard 7 on estate agency fees which provides that if a deal is aborted, the estate agent is entitled to claim 50% of the full fee or 50% of the forfeited deposit, whichever is the lower. By claiming only 50% of the forfeited sum, the appellant is claiming for a lesser sum than half of 1.25% of the purchase price.

[16] The High Court judge had erred in concluding that the appellant, the intended purchaser and the respondents were acting in accordance with the terms and conditions under ET2 which had replaced ET1. The respondents had only issued ET2 after having accepted the earnest deposit and the contents of ET2 had only varied some of the terms of ET1 and had neither denied nor varied the abortive fees payable to the appellant. Moreover, the intended purchaser had relied on ET1 as shown by the reference made in ET7.

THE RESPONDENTS' CASE

[17] The respondents contend that it would be a total waste of judicial time and cost for this matter to proceed to trial when all of the evidence has been reduced into writing in five contemporaneous documents, ie ET1, ET2, ET3, ET4 and ET7, which are undisputed. Further, the appellant had admitted in ET3 and ET4 that the REP fees are payable upon receipt of the purchase price in full.

[18] The respondents also aver that the abortive fees are not due and owing to the appellant on the following grounds (as listed at para 11, p 190, Vol 2 of the appeal record):

(a) the respondents did not accept the terms and conditions proposed in ET1 and did not sign the acceptance proforma of ET1;

(b) ET2 stated that the REP fees of 1.25% of the purchase price would only be due and owing to the appellant upon receipt of the purchase price in full by the respondents;

(c) the appellant had confirmed in writing in ET4 that the REP fees was 1.25% of the purchase price in total plus 5% government service tax, and payment of such fees would be upon receipt of the purchase price in full; and

(d) there was no mention and/or reference anywhere in ET1 to ET4 about abortive fees.

[19] Further, the solicitors of the intended purchaser had acknowledged in ET7 that the offer made in ET1 was not accepted and was superseded by a counter proposal in ET2. ET7 also confirmed that the earnest deposit was part payment of 1% of the purchase price and that the intended purchaser was agreeable to the counter proposal in ET2 and was thus acting in accordance with the terms under ET2.

[20] The respondents also submit that they are not bound by the rules and regulations of the Malaysian Estate Agency Standards as such rules and regulations are merely guidelines for practice and not statute.

ANALYSIS

[21] The power of the court to strike out any pleading or endorsement in any writ of action can be found in O 18 r 19 of the RHC which states as follows:

> 19 Striking out pleadings and indorsements (O 18 r 19)
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> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or
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> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

[22] In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 (SC) Mohamed Dzaiddin bin Hj Abdullah SCJ had this to say at p 43 (MLJ); p 11 (CLJ) regarding the exercise of power by the court under O 18 r 19 of the RHC:

A The principles upon which the Court acts in exercising its power under any of the four limbs of O 18 r 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86 p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274 (CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 Rules of the High Court) (*Hubbuck v Wilkinson*). The Court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[23] I also had the opportunity to address the matter while sitting on the High Court bench in *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558; [1999] 2 CLJ 886, whereby after citing a string of authorities on the subject matter, I stated the following at pp 584–585 (MLJ); p 914 (CLJ):

> Relying on all these authorities, it would be appropriate to say that a case should only be struck out if it is obviously unsustainable. The root word here is not 'unsustainable' but rather 'obviously' which denotes that on the face of it, the claim must be plainly or evidently unsustainable in law. In my judgment, these words cannot be read to mean that the court is to undertake, at this early stage, a detailed scrutiny of the documents and examine the evidence of each party to the dispute. To interpret it as such would be to go against the grain of the provisions of O 18 r 19(1) of the RHC. It is apparent that this order was designed specifically to weed out claims that are clearly unfounded and the rationale behind this Order has been described lucidly by Tan Sri Chang Min Tat, a former judge of the Federal Court, in *Mallal's Supreme Court Practice*, (2nd Ed), Vol 1 at p 219 as follows:
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> This rule enforces the rules of pleading. The court has the power (i) in a summary manner, ie without trial, to stay or dismiss an action or enter judgment accordingly where the pleading discloses no reasonable cause of action or defence, or is scandalous, frivolous or vexatious as it prejudices, embarrasses or delays the fair trial of the action or it is otherwise an abuse of the process of the court. The rule applies as well to an originating summons and a petition, as if the originating summons and a petition were a pleading. But the rule also empowers the court to allow amendments of any pleading in addition to the powers under Order 20.

[24] There are numerous authorities regarding the subject matter. The parties have helpfully assisted the court by referring to, among others, *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413; *Cepatwawasan Group Bhd & Anor v Tengku Dato' Kamal Ibni Sultan Sir Abu*

Bakar & 17 Ors [2008] 2 MLJ 915; and *Sivakumar a/l Varatharaju Naidu v Ganesan a/l Retanam* [2010] 7 MLJ 355; [2010] 9 CLJ 825 (CA).

[25] In essence, the question faced by the High Court Judge in determining the respondents' application under O 18 r19 of the RHC was whether it was plain and obvious that the appellant's claim is unsustainable.

[26] The findings made by the High Court judge can be summarised as follows:

> 8 The plaintiff's claim is based upon para 10 of exh ET '1' of encl 6 which is the plaintiffs letter proposing the terms and conditions of sale for the property …
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> 9 It is clear to me that the defendants did not sign ET '1' and therefore the defendants cannot be held to be bound by ET '1'. So that should be the end of this issue.
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> …
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> 16 As such it is clear to this court that the defendants, the intended purchaser and the plaintiff were acting in accordance with the terms and conditions as contained in ET '2' and not ET '1' which had been replaced by ET '2'.

[27] The High Court judge was correct in his finding that the appellant's claim is hinged on the terms and conditions of ET1, more specifically para 10 of ET1 regarding REP fees whereby it states that the appellant is entitled to abortive fees of half of REP fees as services rendered if the transaction is aborted and the earnest deposit is forfeited by the respondents. This is stated in the appellant's amended statement of claim at para 16, p 62, Vol 1 of the appeal record.

[28] Our perusal of ET1 reveals that the document is tantamount to an offer made by the appellant on behalf of the intended purchaser. The title of the document itself is a dead giveaway: 'Proposed Sale of Property …'. ET1 went on to provide the terms and conditions agreeable by the intended purchaser and requests at the end of ET1 for the respondents to confirm their acceptance of ET1 by signing and returning the document.

[29] By neither signing nor executing the proforma invoice at the bottom of ET1, the respondents cannot be said to have agreed to the terms and conditions of ET1. Further, they have not acquiesced to such terms and conditions by conduct as pursuant to a meeting between the parties on 5 June 2008, the respondents had made a counter offer in ET2. ET2 contained the revised terms and conditions which had effectively replaced or superseded the terms and conditions in ET1. It is to be noted that ET2 was made on the same day as the earnest deposit was accepted and banked in by the respondents.

[30] The appellant's contention that the respondents and the intended purchaser had acted in accordance with the terms and conditions in ET1 is erroneous as the respondents was entitled to forfeit the earnest deposit as provided in para (e)(i) of ET2 which was amended in ET7, and the intended purchaser had clarified in ET7 that the earnest deposit was made as part payment of 1% of the purchase price, as per the term in ET2. For the sake of clarity, the relevant portion of ET7 is reproduced below:

> We refer to our clients offer to purchase the above property made through your agent (YY Property Solutions Sdn Bhd) in their letter of offer to you dated 29 May 2008, a copy whereof is enclosed. We note that you have also on the 5 of June 2008 banked in our clients' CIMB cheque for the sum of RM1,023,660 being part payment of the 1% of the purchase price of RM104,554,000 and made counter proposals on another letter on even date.
>
> Whilst our clients are agreeable to your counter proposal of the purchase price to be based on RM2.400 per square foot rather than RM2,350 per sqft, our clients are not agreeable to items e) (i) and e) (iii) of your letter of 5 June 2008. For the avoidance of doubt items e) (i) should be amended to reflect that the 1% paid to the registered owners of the property shall be forfeited only if our client refuses to sign the Sale and Purchase Agreement after the terms have been agreed upon and e) (iii) to be amended to reflect what is stated in the said letter of offer dated 29 May 2008 ie that the payment of 90% of the balance purchase price to be 90 days from the date of the sale and purchase agreement or 30 days from the date of receipt of the FIC approval which is a condition precedent to the sale whichever is the later.

[31] Although ET7 made mention of a term stipulated in ET1, the agreement struck between the respondents, the appellant and the intended purchaser did not adopt all of the terms and conditions of ET1 as only the specific term of para (e)(iii) of ET2 was amended to reflect the term made in ET1.

[32] The appellant avers that the abortive fees claimed are different from the REP fees. However, in our judgment, these fees are interdependent as the proposed term regarding the abortive fees was parked under the proposed clause on REP fees in ET1 and such proposed clause stated that the calculation of the abortive fees would be half of REP fees should the deposit made by the intended purchaser be forfeited in the event of an aborted transaction. Such proposed term regarding the abortive fees was not agreed upon by the respondents and was not featured in any correspondence between the parties regarding the formation of the agreement ever since. Moreover, the appellant had acknowledged the revised term on REP fees as evidenced in ET3 and ET4 whereby no mention was made regarding abortive fees.

[33] In addition, another ground of appeal is the purported failure by the High Court judge to sufficiently give due consideration to the standard

practice in the Malaysian Real Estate Agency Standards pertaining to agency fees and abortive fees, as stated at para 7, p 14, Vol 1 of the appeal record. Such purported failure had occurred despite the appellant having relied on the Malaysian Estate Agency Standards in its submission to the High Court judge and the document being featured in the appellant's bundle of authorities in the High Court, in order to prove the standard practice in a real estate market.

[34] The High Court judge made the following finding regarding the appellant's contention in his judgment at p 26 of the appeal record at Vol 1, part 'A':

> 13 The Plaintiff in para 17 of their Amended Statement of Claim (Encl 4A) contends that their claim of 50% of the sum is a standard practice in the Malaysian Real Estate market and dealings. This contention is a bare unsubstantiated statement not worthy of due consideration by this Court.

[35] Contrary to the appellant's averment, we find that the High Court judge did not commit an error by failing to give due consideration to the Malaysian Real Estate Agency Standards. This is because the appellant had not pleaded in its amended statement of claim that it was placing reliance on the Malaysian Real Estate Agency Standards to prove that the imposition of the abortive fees is a standard practice in the Malaysian real estate market and dealings. All that was stated in the appellant's amended statement of claim regarding the matter at para 17, p 62, Vol 1 of the appeal record is as follows:

> 17 The Plaintiff contends that their claim of 50% of the forfeited sum is a standard practice in the Malaysian Real Estate market and dealings.

[36] Further, even if the Malaysian Real Estate Agency Standards were pleaded in the appellant's amended statement of claim, we agree with the contention made by the respondents' counsel that the rules and regulations of the Malaysian Estate Agency Standards are merely guidelines for practice and are not binding upon the parties. This is reflected in the introduction of the Malaysian Estate Agency Standards (provided in tab E of the appellant's bundle of authorities) which states that the objective of the document was to 'set the required high standards for the practice of estate agency in Malaysia' and will 'aid and elaborate upon the provisions of the Valuers, Appraisers and Estate Agents Act 1981 and the Valuers, Appraisers and Estate Agents Act 1986 in so far as they deal with the practice of estate agency in Malaysia'.

[37] Moreover, based on Standard 7 regarding estate agency fees which is raised by the appellant in its appeal submission at para 35, p 181, Vol 2 of the appeal record to prove its claim for abortive fees, of pertinence would be the terms and conditions of the agreement between the estate agent and the

principal. In the present case, the terms and conditions applicable are the ones stated in ET2 between the appellant, the respondents and the intended purchaser which had superseded the terms and conditions in ET1. The relevant portion of Standard 7 of the Malaysian Real Estate Agency Standards at p 12 of tab E of the appellant's bundle of authorities is reproduced below:

> 7.1.0 INTRODUCTION
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> 7.1.3. Estate agency comes under the Law of Contract and estate agency fees are generally dependent upon the agency agreement between the estate agent and the principal. It is thus important for the estate agent to always obtain written instructions from the principal before commencement of the estate agency assignment.
>
> 7.2.0 STATEMENTS OF STANDARD
>
> 7.2.1 The first rule in so far as estate agency fees are concerned is that it depends upon the terms and conditions of the agreement between the estate agent and the principal.

[38] Therefore, the appellant's claim is plainly and obviously unsustainable as it's hinged on firstly, the terms and conditions of ET1 which were not agreed upon by the respondents, were not binding upon them and were not acted in accordance to by the parties, and secondly, the standard practice in a real estate market which was an unsubstantiated contention. Even if the appellant had raised the Malaysian Real Estate Agency Standards in its pleading, they are also non-binding and had yielded its importance to the agreement reached between the parties. Such agreement did not contain a term on abortive fees which the appellant was entitled to in the event that the transaction was aborted and the earnest deposit was forfeited by the respondents.

[39] For the reasons delineated above, we unanimously dismissed the appeal against the High Court decision to strike out the appellant's writ of summons and statement of claim pursuant to O 18 r 19(1)(b) and (d) of the RHC. We affirmed the decision of the High Court and awarded costs of RM10,000 here only. Deposit to the respondents.

Appeal dismissed.

Reported by Ashok Kumar